Danaharta Urus Sdn Bhd v Safri bin Nawawi & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO D8–22–1137 OF 2004
ABDUL AZIZ ABDUL RAHIM J
15 MARCH 2010

Civil Procedure — Counterclaim — Striking out — Whether plaintiff's claim frivolous — Whether plaintiff had cause of action and locus standi to institute proceedings against defendants — Whether action barred by res judicata — Whether there was cause of action against third defendant company whose affairs were managed by special administrators

Companies and Corporations — Receivership — Appointment of special administrators — Acquisition of non-performing loan by Danaharta — Whether Danaharta and its subsidiary acted in bad faith, fraudulently and in conspiracy with special administrators to deprive plaintiff of assets in company — Whether Danaharta and its subsidiary immune from action — Whether actions of special administrators could be reversed or affected by any court order — Pengurusan Danaharta Nasional Berhad Act 1998 ss 25A(3), 39, 46(4), 66 & 72(b)

Safire Pharmaceuticals (M) Sdn Bhd ('Safire'), the third defendant in the counterclaim, was granted credit facilities by Bank Bumiputera Malaysia Bhd ('the bank'). The plaintiff in the counterclaim (the first defendant in the original action) ('the plaintiff') and Dr Hamimah bt Idruss (the second defendant in the original action), who were both directors of Safire, jointly and severally guaranteed the facilities. When Safire defaulted in its repayments on the credit facilities and the guarantors failed to fulfill their obligation under the terms of the guarantees and indemnities, the loan became classified as a non-performing loan and was acquired by Danaharta Urus Sdn Bhd, the first defendant in the counterclaim ('the first defendant'), which was a subsidiary of Pengurusan Danaharta Nasional, the second defendant in the counterclaim ('the second defendant'). Thereafter all the rights, title and interest of a bank in respect of the loan became vested in the first defendant, pursuant to s 14 of the Pengurusan Danaharta Nasional Berhad Act 1998 ('the Act'). After having taken over the debt, the first defendant exercised its right under ss 23 and 24 of the Act to appoint special administrators, the fifth and sixth defendants in the counterclaim ('the fifth and sixth defendants') to manage the assets and the affairs of Safire. The seventh defendant in the counterclaim ('the seventh defendant') was at all material times the non-executive chairman and a member of the board of directors of Pengurusan Danaharta by virtue of s 5 of the Act. The fifth and sixth defendants' investigations revealed that Safire had

accumulated losses of more than RM20m and they decided to carry out a tender exercise for the sale of Safire's business and assets. They then received and accepted a bid of RM20m from Pharmaniaga Bhd, the fourth defendant in the counterclaim ('the fourth defendant') to take over the business and assets of Safire, excluding the cash and trade debtors. The workout proposal ('WP') prepared by the fifth and sixth defendants to this effect, which was approved by an independent advisor, was implemented and the fourth defendant effectively took over Safire. After the takeover exercise the first defendant commenced an action against the plaintiff for the balance of the debts. The plaintiff filed a counterclaim against the seven defendants. The crux of the plaintiff's allegation in the counterclaim was that the first and second defendants had acted in bad faith, fraudulently and in conspiracy with others including the fifth and sixth defendants to deprive the plaintiff of his interest in Safire and to sell Safire's assets at under value. As against the seventh defendant, the plaintiff alleged that the seventh defendant had failed to make proper disclosure of his interest in the fourth defendant, namely that he was the chairman of the fourth defendant. By way of the counterclaim the plaintiff sought various declaratory reliefs against all the defendants, as well as to set aside the sale of business and assets of Safire to the fourth defendant by the second defendant. The plaintiff further alleged that the first and second defendants had wrongfully and fraudulently proceeded with the sale of Safire without considering the rights and obligations of Safire's shareholders. The applications which formed the subject matter of this judgment were the various applications made by the defendants in the counterclaim to strike out the plaintiff's counterclaim.

Held, allowing the defendants' applications with costs:

(1) The first and second defendants had shown that Safire was insolvent, in that its liabilities far exceeded its assets. As such the allegations of bad faith, fraud and conspiracy made against the first and second defendants was baseless. Further, the plaintiff's counterclaim was barred by the doctrine of res judicata because similar allegations had already been raised against the first, second, fifth and sixth defendants when the plaintiff commenced an action against them in the name of the company ie Safire, which was struck off with no appeal. It was also found that since the allegation of the wrong done was done to the company ie to Safire, only Safire could maintain the action and not the shareholders. As such, the plaintiff had no locus standi to sue and the counterclaim ought to be struck off. In any event the first and second defendants are granted immunity from action under the Act. For these reasons, it was found that the first and second defendants' applications to strike out the plaintiff's counterclaim application would be allowed with costs (see paras 15–17, 19–21, 23 & 26).

(2) At all material times the management of Safire's affairs and the subsequent sale of its business were placed entirely under the fifth and

sixth defendants as special administrators pursuant to the provisions of the Act. As such the counterclaim against Safire as the third defendant showed no reasonable cause of action and ought to be struck out. Further, pursuant to s 72 of the Act, the actions by the fifth and sixth defendants as the special administrators could not be reversed or be affected by any order granted by a court of law. The counterclaim against Safire as the third defendant was also unsustainable, frivolous and vexatious because the plaintiff had no locus standi (see paras 27–30).

(3) By virtue of s 72(b) of the Act no order of court can be granted to affect any action taken by the first and second defendants or the fifth and sixth defendants. As such, the application to strike out by the fourth defendant was also allowed (see para 37).

(4) Although the seventh defendant was at all material times the non-executive chairman and a member of the board of directors of Pengurusan Danaharta and also the chairman of the fourth defendant, having regard to the circumstances and the factual matrix of the case, he was not involved in the management of the assets and affairs of Safire. Thus the plaintiff had failed to show any conflict of interest that required to be disclosed by the seventh defendant in respect of the sale of Safire to the fourth defendant. In any event, if any injury was done to Safire only the company ie Safire can mount this action if it wants to. Thus, the seventh defendant's application to strike out the plaintiff's counterclaim was also allowed (see paras 40–42).

[Bahasa Malaysia summary

Safire Pharmaceuticals (M) Sdn Bhd ('Safire'), defendan ketiga, telah diberikan kemudahan kewangan oleh Bank Bumiputera Malaysia Bhd ('bank tersebut'). Plaintif di dalam tuntutan balas (defendan pertama di dalam tindakan asal) ('plaintif') dan Dr Hamimah bt Idruss (defendan kedua di dalam tindakan asal), kedua-duanya pengarah Safire, secara bersama dan berasingan telah menjamin kemudahan tersebut. Apabila Safire gagal dalam pembayaran baliknya ke atas kemudahan kewangan itu dan penjamin-penjamin gagal memenuhi kewajipan mereka di bawah syarat-syarat jaminan dan indemniti, pinjaman tersebut diklasifikasikan sebagai pinjaman tak dilaksanakan dan telah diperoleh oleh defendan pertama di dalam tuntutan balas, Danaharta Urus Sdn Bhd ('defendan pertama'), yang merupakan anak syarikat Pengurusan Danaharta Nasional, defendan kedua di dalam tuntutan balas (defendan kedua'). Berikutan itu semua hakmilik dan kepentingan bank berkaitan pinjaman itu terletak pada defendan pertama, menurut s 14 Akta Pengurusan Danaharta Nasional Berhad 1998 ('Akta tersebut'). Selepas mengambil alih hutang itu, defendan pertama menggunakan haknya di bawah ss 23 dan 24 Akta tersebut untuk melantik pentadbir-pentadbir khas, defendan-defendan kelima dan keenam di dalam tuntutan balas (defendan-defendan kelima dan keenam') untuk menguruskan aset-aset dan

urusan-urusan Safire. Defendan ketujuh di dalam tuntutan balas ('defendan ketujuh') pada setiap masa matan merupakan pengerusi bukan eksekutif dan ahli lembaga pengarah Pengurusan Danaharta menurut s 5 Akta tersebut. Siasatan defendan-defendan kelima dan keenam menunjukkan bahawa Safire telah mengumpul kerugian lebih daripada RM20 juta dan mereka memutuskan untuk melaksanakan amalan tender untuk menjual perniagaan dan aset-aset Safire. Mereka kemudian telah mendapat dan menerima tawaran RM20 juta daripada Pharmaniaga Bhd, defendan keempat di dalam tuntutan balas ('defendan keempat') untuk mengambil alih peniagaan dan aset-aset Safire, tidak termasuk wang tunai dan penghutang perniagaan. Cadangan penyelesaian ('CP') yang disediakan oleh defendan-defendan kelima dan keenam berhubung perkara ini, yang diluluskan oleh penasihat berasingan, telah dilaksanakan dan defendan keempat secara efektif telah mengambil alih Safire. Selepas amalan pengambilalihan defendan pertama telah memulakan tindakan terhadap plaintif untuk baki hutang. Plaintif telah memfailkan tuntutan balas terhadap ketujuh-tujuh defendan itu. Inti pati pengataan plaintif dalam tuntutan balas itu adalah bahawa defendan-defendan pertama dan kedua telah bertindak dengan niat jahat, secara fraud dan konspirasi dengan orang lain termasuklah defendan-defendan kelima dan keenam agar menafikan plaintif kepentingannya dalam Safire dan untuk menjual aset-asset Safire di bawah nilai. Terhadap defendan ketujuh, plaintif mengatakan bahawa defendan ketujuh telah gagal membuat pendedahan yang betul tentang kepentingannya dalam defendan keempat, iaitu bahawa dia adalah pengerusi kepada defendan keempat. Melalui tuntutan balas plaintif memohon pelbagai relief-relief deklarasi terhadap kesemua defendan, dan juga untuk mengetepikan jualan perniagaan dan aset-aset Safire kepada defendan keempat oleh defendan kedua. Selanjutnya plaintif mengatakan bahawa defendan-defendan pertama dan kedua secara salah dan fraud meneruskan jualan Safire tanpa mengambilkira hak-hak dan kewajipan-kewajipan pemegang-pemegang saham Safire. Permohonan-permohonan yang membentuk perkara penting penghakiman ini adalah pelbagai permohonan-permohonan yang dibuat oleh defendan-defendan dalam tuntutan balas itu untuk mengetepikan tuntutan balas plaintif.

Diputuskan, membenarkan permohonan defendan-defendan dengan kos:

(1) Defendan-defendan pertama dan kedua telah menunjukkan bahawa Safire adalah tak solven, di mana liabilitinya melebihi aset-asetnya. Oleh itu pengataan-pengataan berniat jahat, fraud dan konspirasi yang dibuat terhadap defendan-defendan pertama dan kedua tidak berasas. Selanjutnya, tuntutan balas plaintif terbatas oleh doktrin res judicata kerana pengataan sama telahpun ditimbulkan terhadap defendan-defendan pertama, kedua, kelima dan keenam apabila plaintif-plaintif memulakan tindakan terhadap mereka atas nama syarikat, iaitu Safire, yang telah dibatalkan tanpa rayuan. Adalah juga

didapati bahawa memandangkan pengataan kesalahan yang dibuat telah dibuat ke atas syarikat itu iaitu Safire, hanya Safire boleh mengekalkan tindakan itu dan bukan pemegang-pemegang saham. Oleh itu, plaintif tiada locus standi untuk menyaman dan tuntutan balas itu patut dibatalkan. Dalam apa keadaanpun defendan-defendan pertama dan kedua diberikan kekebalan daripada tindakan di bawah Akta tersebut. Oleh sebab-sebab tersebut, adalah didapati bahawa permohonan defendan-defendan pertama dan kedua untuk membatalkan permohonan tuntutan balas plaintif dibenarkan dengan kos (lihat perenggan 15–17, 19–21, 23 & 26).

(2) Pada setiap masa matan pengurusan urusan-urusan Safire dan seterusnya jualan perniagaannya telah diletakkan sepenuhnya di bawah defendan-defendan kelima dan keenam sebagai pentadbir-pentadbir khas menurut peruntukan-peruntukan Akta tersebut. Oleh itu tuntutan balas terhadap Safire sebagai defendan ketiga tidak menunjukkan kausa tindakan yang munasabah dan patut dibatalkan. Selanjutnya, menurut s 72 Akta tersebut, tindakan-tindakan oleh defendan-defendan kelima dan keenam sebagai pentadbir-pentadbir khas tidak boleh dibatalkan atau terjejas oleh apa-apa perintah yang diberikan oleh mahkamah undang-undang. Tuntutan balas terhadap Safire sebagai defendan ketiga juga tidak boleh kekal, remeh dan menyusahkan kerana plaintif tiada locus standi (lihat perenggan 27–30).

(3) Menurut s 72(b) Akta tersebut tiada perintah mahkamah boleh diberikan untuk menjejaskan apa-apa tindakan yang diambil oleh defendan-defendan pertama dan kedua atau defendan-defendan kelima dan keenam. Oleh itu, permohonan pembatalan oleh defendan keempat juga dibenarkan (lihat perenggan 37).

(4) Meskipun defendan ketujuh adalah pada setiap masa matan pengerusi bukan eksekutif dan ahli lembaga penarah Pengurusan Danaharta dan juga pengerusi defendan keempat, dengan mengambilkira keadaan dan matriks faktual kes, dia tidak terlibat dalam pengurusan aset-aset dan urusan-urusan Safire. Oleh itu plaintif gagal menunjukkan apa-apa konflik kepentingan yang perlu didedahkan oleh defendan ketujuh berkaitan jualan Safire kepada defendan keempat. Walau bagaimanapun, jika apa-apa yang terjejas terhadap Safire hanya syarikat itu iaitu Safire boleh memulakan tindakan ini jika ia ingin berbuat demikian. Oleh itu, permohonan defendan ketujuh untuk membatalkan tuntutan balas plaintif juga dibenarkan (lihat perenggan 40–42).]

Notes

For cases on receivership in general, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 602–688.

For cases on striking out, see 2(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2460–2461.

Cases referred to

Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd & Ors [1995] 3 MLJ 417, CA (refd)
Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189; [1995] 3 CLJ 783, SC (refd)
Cheng Heng Ping & Ors v Perwira Affin Bank Bhd [1998] MLJU 576; [1999] 1 CLJ 611, HC (refd)
Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, intervener) [2004] 2 MLJ 257; [2004] 1 CLJ 701, FC (refd)
Foss v Harbottle (1843) 2 Hare 461 (refd)
Menah Sulong v Lim Soo & Anor [1983] CLJ (Rep) 263, FC (refd)
Suppuletchimi v Palmco Bina Sdn Bhd [1994] 2 MLJ 368; [1994] 2 AMR 1191, HC (distd)
Tuan Haji Ishak bin Ismail & Ors v Leong Hup Holdings Bhd and other appeals [1996] 1 MLJ 661, CA (refd)
Vandervell Trustees Ltd v White and others [1971] AC 912, HL (refd)

Legislation referred to

Companies Act 1965
Federal Constitution art 153
Pengurusan Danaharta Nasional Berhad Act 1998 ss 5, 14, 22, 23, 24, 25A(3), 26, 28, 39A, 44, 44(3), 45, 46(1), (3), (4), 48(3), 60, 66, 66(1), 72, 72(b)
Rules of the High Court 1980 O 18 r 19(1)(b), (c), (d)

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James Khong (James Khong) for the third defendant in the counterclaim action.
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Abdul Aziz Abdul Rahim J:

[1] Enclosures 33, 35, 37, 39, 52, 53, 54, 55, 57, 78, 79, 126 and 261 are applications by defendants in the counterclaim to strike out the first and second defendants' claim in the counterclaim.

[2] In the original action Danaharta Urus Sdn Bhd ('the plaintiff') had sued the first and second defendants as a guarantor for non-performing loan taken by Safire Pharmaceutical (M) Sdn Bhd (the third defendant in the counterclaim). Safire Pharmaceutical (M) Sdn Bhd is not a party to the original

claim. To be noted from the on set is that the assets and business of Safire Pharmaceutical (M) Sdn Bhd have already been sold by Danaharta Urus Sdn Bhd to Pharmaniaga Bhd (the fourth defendant in the counterclaim) to repay the said loan. The disposal of the assets and business of Safire Pharmaceutical (M) Sdn Bhd (the third defendant in the counterclaim) to Pharmaniaga Bhd (the fourth defendant in the counterclaim) was made pursuant to the provisions of Pengurusan Danaharta Nasional Berhad Act 1998.

[3] For ease of reference in this decision, the reference to the first plaintiff or second plaintiff or reference to the plaintiff is a reference to the first plaintiff and second plaintiff in the counterclaim and the reference to the first to seventh defendants or the reference to the defendants is referred to the defendants to the counterclaim.

BACKGROUND FACTS

[4] The second defendant, Pengurusan Danaharta Nasional Bhd was established as a corporation incorporated under the Companies Act 1965. The first defendant, Danaharta Urus Sdn Bhd is a subsidiary of the second defendant.

[5] The plaintiff was a minority shareholder and director in the third defendant. The third defendant was granted credit facilities by Bank Bumiputera Malaysia Bhd as the principal borrower. The facilities were guaranteed by the plaintiff and one Dr Hamimah bt Idruss (who is the second defendant in the original claim). Both the plaintiff and Dr Hamimah were two of the four directors of the third defendant and has executed the guaranteed document as directors of the third defendant. The plaintiff and Dr Hamimah had jointly and severally guaranteed the facilities as principal debtor. The payment under the guarantee is payment on demand of all monies due and owing by the borrower ie the third defendant to the bank. It was alleged that the borrower had defaulted in the repayment and the plaintiff and Dr Hamimah had failed to fulfill their obligation under the terms of guarantees and indemnities dated 13 May 1996 and 21 February 1998.

[6] Pursuant to a vesting certificate and s 14 of the Pengurusan Danaharta Nasional Berhad Act 1998 ('the Act'), all rights, title and interest of a bank in and with respect to the borrowers outstanding facilities are vested into and taken over by Danaharta Urus Sdn Bhd (the first defendant) effective from 7 May 1999. Having vested with the rights of the bank, Danaharta then exercise its right under ss 23 and 24 of the Act to appoint the fifth and sixth defendants as special administrators for the third defendant with the approval of the oversight committee to manage the assets and the affairs of the borrower (ie the third defendant). At this juncture, it is pertinent to note that the seventh

defendant at all material times was the non-executive chairman and member of the board of directors of Pengurusan Danaharta by virtue of s 5 of the Act.

[7] The special administrators (ie the fifth and sixth defendants) then opened a tender offering the sale or taking over of the business and assets of the third defendant, the borrower. At the close of the tender, the special administrators received a bid from the fourth defendant for RM20m to take over the business and assets of the borrower excluding the cash and trade debtors. The fourth defendant bid was accepted on 24 May 2002. Following the acceptance, the special administrators (ie the fifth and sixth defendants) prepared a workout proposal pursuant to s 44 of the Act, inter alia, to include the taking over of the borrower's (ie the third defendant) business and assets by the fourth defendant and for the distribution of the proceeds of sale to the creditors. At the same time, an independent advisor ie Messrs Anuarul Azizan Chew & Co was appointed on 16 August 2002 pursuant to s 26 of the Act to review the reasonableness of the proposal and to provide a report to Pengurusan Danaharta. The independent advisor was of the view that the proposal was reasonable. Pengurusan Danaharta then approved the proposal submitted by the special administrators. The original proposal was later modified by the special administrators in exercise of their power of s 28 of the Act to include the payment due and owing by the borrower to Perbadanan Kemajuan Negeri Perak pertaining to a property known as Lot 120, Pharmaceuticals Park, Bandar Baru Seri Iskandar, Perak. The modified workout proposal was reviewed by the independent advisor who found it to be reasonable. Subsequently the modified workout proposal was implemented and the fourth defendant effectively took over the third defendant company ie the borrower, subscription for RM20m new ordinary shares.

[8] After the exercise and in pursuant to its right given under the vesting order the first defendant sued the first and second plaintiffs, in the original action for the balance of the sum owing. Following the suit, the first and second plaintiffs filed a counterclaim against the defendants. Subsequently the plaintiff filed application to amend the counterclaim. But this was dismissed by senior assistant registrar.

[9] Enclosure 266 is affidavit by the first and second defendants to oppose the plaintiff in the counterclaim application to amend the counterclaim. On 17 November 2008, the court rejected the plaintiff's appeal to the judge in chambers against the senior assistant registrar's decision dismissing the plaintiff's application to amend the counterclaim. The plaintiff appealed to the Court of Appeal against that decision. The appeal is still pending. Meanwhile all the defendants in the counterclaim had filed applications to strike out the counterclaim (as unamended) and these applications were fixed for hearing. The plaintiff's counsel urged the court to defer the hearing of the striking out

application to another date until after the determination of the plaintiff's appeal against the court's refusal to allow the amendment to the counterclaim. However this was objected by all the defendants on the ground that the matter has been long outstanding since 2005 and as to date no date of hearing of the appeal has been fixed.

[10] I agree with the objection and proceeded with the hearing of the striking out application by the defendants in the counterclaim.

[11] To return to the present applications, I will first deal with application by the first defendant and second defendant in encls 33 and 35. This application is to strike out the first and second plaintiffs' counterclaim respectively. Enclosure 37 are applications by the second defendant to strike out the first and second plaintiffs' counterclaim respectively.

[12] The first defendant is a subsidiary of the second defendant. Under s 60 of the Act, it is provided that the provisions of the Act apply to the subsidiary as if the subsidiary is Danaharta itself.

[13] With regard to the first and second defendants, they have taken over the loans of the third defendant and has prepared a workout proposal for the repayment of the loan by the third defendant. Under the workout proposal which was subsequently modified by the special administrators (ie the fifth and sixth defendants) appointed by the first defendant to carry out the exercise, the original share in the third defendant were reduced and new shares were issued. The new shares of the third defendant were subsequently subscribed by the fourth defendant. The subscription price raised from the new shares were then used for part payment of the third defendant's debt. The original shareholders of the third defendant including the plaintiff in the counterclaim had the shareholding reduced to the total of RM50. In other words, when the second defendant, through the first defendant took over the loan and proposed the modified workout proposal, the shares of the third defendant is almost worthless.

[14] The plaintiff in the original action (ie the first defendant in the counterclaim) is now suing the defendants (ie the plaintiff in the counterclaim) for the balance of the debts.

[15] The crux of the plaintiff's allegation against the first and second defendants in the counterclaim is that the first and second defendants had acted in bad faith, fraudulently and in conspiracy with others including the special administrators (ie the fifth and sixth defendants) to deprive the plaintiff of their interest in the third defendant and to sell the third defendant's assets at under value.

[16] However, I find on the affidavit evidence a firm by Andrew Chong dated 28 January 2005 (encl 32) filed for and on behalf of the first and second defendants, that the allegations are baseless. A

[17] On the allegation on bad faith, fraud and conspiracy, one must look at the process and manner by which the third defendant's assets were disposed of. In their affidavit (encl 32) filed to support the striking out application, the first and second defendants has shown that the third defendant (ie the borrower) was insolvent. At the end of 1999, the third defendant was already insolvent. It has a total assets of RM42,077,068 but with a total liability of RM57,979,443. So the net value of the third defendant then was negative RM15,902,375. But by end of 2001, the third defendant indebtedness has exceeded his assets by RM24,285,525. In this situation I agree with the submission by the first defendant and the second defendant that the third defendant's shares were worthless. Moreover, at the same time the accumulated losses by the third defendant was more than RM20m. B C D

[18] With regard to the plaintiff's claim that the rejection of the Perbadanan Kemajuan Ekonomi Negeri Perak ('PKNP') offer of settling the debt with the third defendant for RM25m was wrong and unreasonable, the first and second defendants had explained in their affidavit that the offer was rejected because PKNP was asking for a discount of 50% of the debt. The total debt owing by PKNP to the third defendant then was RM50m. The first and second defendants said in the their affidavit that they had asked for RM30m as the acceptable settlement sum but that was not agreed to by PKNP. It was also explained that there was a series of negotiation with PKNP which started for over 2 1/4 years but no acceptable solution was available. None of the proposal by PKNP to settle the debt were acceptable to the first and second defendants. With regard to this issue, I think I can accept the explanation by the first and second defendants that they are entitled to reject the PKNP proposal if it was not in the interest of the third defendant. E F G

[19] Next argument by the first and second defendants is that the plaintiff's counterclaim is barred by the doctrine of res judicata. This is so because on 20 March 2002, the plaintiff had filed a Suit No D3–22–416 of 2002 in Kuala Lumpur High Court in the name of the third defendant against the first, second, fifth and sixth defendants. The suit was however struck off on application by the first and second defendants in the counterclaim. No appeal was filed against the striking out. This fact is also stated in Andrew Chong's affidavit in encl 32 at para 9. In that suit the plaintiff also raised allegation against the first and second defendants similar to the allegations in the plaintiff's counterclaim herein. In striking out that suit the first and second defendants not only challenged the authority of the plaintiff to commence the action but also indicated to the court that the action was clearly unsustainable H I

and doomed to failure, a contention which was accepted by the court. For that reason, I think the doctrine of res judicata is available to the first and second defendants:

> Where a matter between two parties has been adjudicated by a court of competent jurisdiction, they and their privies are not permitted to litigate once more the res judicata, as the judgment becomes the truth between such parties. An estoppel per res judicata has been created as a result: *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 at p 190.

[20] The next argument by the first and second defendants is that on the fact pleaded in the counterclaim by the plaintiff, it appears that the allegation of the wrong done were done to the company ie to the third defendant. On the principle stated in *Foss v Harbottle* (1843) 2 Hare 461 and accepted in *Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd & Ors* [1995] 3 MLJ 417, only the company ie the third defendant itself can maintain the action but not the shareholders. In this respect the main complaint by the plaintiff is that the assets of the third defendant were disposed of at under value. Therefore, if any party is to take action to challenge this act by the first defendant, that party has to be the third defendant itself. In this regard, I accept the first and second defendants' contention that the plaintiff have no locus standi to sue and that their counterclaim ought to be struck off.

[21] The first and second defendants also contended that they are not responsible for the conduct of the special administrators or other parties such as the accountant who valued the assets and the professional valuers who valued the landed properties with respect to the sale of the third defendant's assets. It was argued that the special administrators and other parties are independent parties for whose conduct the first and second defendants is not responsible or liable. In any event, the first and second defendants also argued that under the Act that they are granted immunity from action. Specifically the first and second defendants referred to the provisions of ss 25A(3), 39A, 46(4), 66 and 72 of the Act.

[22] It is pertinent to note that the issue of immunity of Danaharta ie the second defendant and its associated companies including the first defendant has been decided in the earlier case ie Kuala Lumpur High Court Suit No D3–22–416 of 2006.

[23] I also agree with the submission that there is no possible claim for bad faith against the second defendant or its associated companies in disposing the assets of the third defendant. I say so because the Act was passed by the Legislature under which the Danaharta ie the second defendant was incorporated for the purposes of cleaning up the economy of non-performance

loan. In carrying out the exercise, Danaharta acquired thousands of debts from financial institutions and the third defendant is just one of them. It is also pertinent to note that in carrying out their task, the Danaharta and its associated companies are being supervised. One of the machinery in this supervision is the appointment of the special administrators to manage problematic companies acquired by Danaharta. The appointment of this special administrators is done with the approval of the oversight committee established under s 26 of the Act. The oversight committee comprises of a representative each from the Ministry of Finance, Bank Negara and Securities Commission. Therefore I accept the submission by the first and second defendants that it is incredulous and absurd to suggest that the whole machinery of the statutory bodies established by the Act and government authorities have acted in conspiracy and fraud against the third defendant.

[24] With regard to the other allegations by the plaintiff that the third defendant has not defaulted in the payment of the loan and that the third defendant was able to pay its debt, I find no merits in such contention. As can be seen from the plaintiff's affidavit in encl 32, the third defendant's liabilities far exceed its assets. If the contention by the plaintiff that the third defendant has not defaulted the payment to the bank of its loan, then why did the loan is classified as a non-performing loan and had to be acquired by Danaharta?

[25] On the contention that the workout proposal by the special administrators was not disclosed to the plaintiff as shareholders of the third defendant and also that the plaintiff was not consulted by the special administrators in preparing the workout proposal, this contention also has no merit. It was submitted, and I accepted, that the workout proposal was prepared by the special administrators for restructuring of the debtor's debt ie the third defendant's debt. Under s 46(1) and (3) of the Act, the workout proposal is to be served only on the debtor and its secured creditors. And the approval for the workout proposal is only required from the secured creditors. The shareholders and the unsecured creditors are not entitle to receive the proposal and have no say on it except the right to inspect it after it has been approved by the secured creditors. A point to note is that the workout proposal is reviewed by an independent advisor as provided under ss 44(3) and 45 of the Act for reasonableness and to be agreed by Danaharta before it is tabled to the secured creditors for approval. Under s 46(4) of the Act, it is provided that once the workout proposal is approved by the secured creditors it is binding on all parties affected by it.

[26] For the above reasons, the application to strike out the first and second plaintiffs' counterclaim by the first and second defendants is allowed with costs.

[27] Now I will deal with the application to strike out the counterclaim by the third defendant in encls 78–79. A point to note in respect of the counterclaim by the plaintiff against the third defendant is that, in the original claim the plaintiff (as the defendant there) was sued as guarantor of a non-performing loan taken by the third defendant. The third defendant as the borrower was not a party in the original action. In the counterclaim against the third defendant, the plaintiff contend that they executed the guarantee for the third defendant's loan as director of the third defendant. They contend that the said guarantee is unenforceable and that the first defendant (ie the plaintiff in the original claim) must show there was a default on the loan. This is in addition to the grounds challenging the appointment and working of the special administrators and also the sale of the third defendant assets at under value as similarly raised in the claim against the first and second defendants in the counterclaim.

[28] On the basis of the pleaded facts in the counterclaim against the third defendant, the first ground by the third defendant to strike out the counterclaim is that it shows no reasonable cause of action against the third defendant. I agree with this submission. This is because at all material times the management of the third defendant's affairs and the subsequent sale of its business were placed entirely under the special administrators pursuant to the provisions of the Act. Therefore the third defendant cannot be said to be liable for the alleged act of the first, second and fourth to seventh defendants which formed the subject matter of the counterclaim.

[29] Furthermore, pursuant to s 72 of the Act, the actions by the special administrators cannot be reversed or be affected by any order granted by a court of law: *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, intervener)* [2004] 2 MLJ 257 at pp 283–287. It is also to be observed that relief sought in the counterclaim by the plaintiff do not concern or affect the third defendant. The relief were personal to the plaintiff as shareholder of the third defendant.

[30] On the issue of locus standi, the plaintiff also has no locus standi. Firstly, the wrongs complained of were wrongs done to the company. Thus, only the company ie the third defendant has a right to take action to redress the wrongs. Secondly, the plaintiff held previously only 18% of the share in the third defendant and is a minority shareholding. The counterclaim is not couched as a claim under a derivative action for and on behalf of the third defendant. For the foregoing reasons, I agree with the submission by the third defendant that the counterclaim against the third defendant is obviously unsustainable, frivolous and vexatious and ought to be struck out. I would express the same views with regard to the application by the third defendant to strike out the second defendant's counterclaim in encl 79.

[31] Vide encl 52, the fourth defendant also applied to strike out the counterclaim by the first plaintiff and vide encl 53 the fourth defendant make similar application to strike out the counterclaim by the second plaintiff. The fourth defendant stated two grounds for the application. The first ground is that the plaintiff had no cause of action against them for any alleged wrong doings. Second ground, the plaintiff has no locus standi to maintain the action against the fourth defendant.

[32] In *Tuan Haji Ishak bin Ismail & Ors v Leong Hup Holdings Bhd and other appeals* [1996] 1 MLJ 661 at p 679, the court accepted the definition of a 'cause of action' to mean:

> the entire set of facts that give rise to enforceable claim; the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment …

[33] In the counterclaim the plaintiff seek various declaratory relief against all the defendants as well as to set aside the sale of business of the third defendant to the fourth defendant by Pengurusan Danaharta ie the second defendant by alleging that the first and second defendants had acted in disregard to the privileges and priority right of the third defendant. It was also alleged that the first and second defendants failed to ascertain the viability of the third defendant and wrongfully and fraudulently proceeded with the sale of the third defendant without considering the rights and obligations of the third defendant's shareholders. As against the fifth and sixth defendants, the plaintiff alleged in the counterclaim that they failed to take into consideration the interest of the third defendant as the affected person.

[34] As against the seventh defendant the plaintiff alleged that the seventh defendant failed to make proper disclosure of his interest in the fourth defendant. On this point, it is to be noted that the seventh defendant was then the chairman of the fourth defendant. From the pleadings in the counterclaim, it is obvious that the allegations and complaints by the plaintiff were leveled against the first and second defendants. The pleadings do not disclose any allegations against or wrong doings by the fourth defendant. With respect to the relief claim against the fourth defendant by the plaintiff it can be seen from the prayers that in essence there is no relief against Pharmaniaga, the fourth defendant. The relief sort by the plaintiff generally is for various declaration in relation to the purported rights of the plaintiff. If at all can be said as a relief that may affect the fourth defendant is the claim by the plaintiff in para 32(c) of the counterclaim where the plaintiff states that the sale of the business and shares of Safire (ie the third defendant) to Pharmaniaga (ie the fourth defendant) and that the agreement between the Perak State Development Corp and the defendant and another dated 18 July 1992 be reinstated and all consequential orders therefrom. The effect of the relief in para 32(c) of the counterclaim is to

put the parties in a position prior to the sale of the third defendant to the fourth defendant ie to reinstate the plaintiff and the Perak State Development Corp as shareholders of the third defendant. At the same time, the plaintiff also seeks declaration that the deprival of the property of the then shareholders of the third defendant (ie including the plaintiff) by the first and second defendants has infringed the special position of the Malays under art 153 of the Federal Constitution and that the fundamental propriety rights of the then shareholders of the third defendant (including the plaintiff) had be violated.

[35] In this regard, I accept the submission by learned counsel of the fourth defendant that such relief is not capable of being granted. Firstly, the plaintiff in the counterclaim had stated that no other parties accept themselves had suffered lost and damaged. Secondly, Perak State Development Corp is not a party to the present proceeding and seek no form of relief whatsoever either to have the sale of the third defendant business set aside or to reinstate the plaintiff as shareholders in the third defendant. Neither did Perak State Development Corp contends that its propriety rights has been violated. On this point, I refer to *Vandervell Trustees Ltd v White and others* [1971] AC 912 at p 944 wherein Lord Diplock held:

> a party to an action must be a person who claims in that action some relief against another party to the action or against whom some relief is claims by another party to the action. There is, in my view, no jurisdiction to add as a party to an existing action a person by and against whom no relief which the court has jurisdiction to grant can be claimed.

[36] The argument by the plaintiff that the striking out should be allowed because the plaintiff had applied to amend the counterclaim and therefore the court should decide the merit of the plaintiff's counterclaim by having regards to the propose amendment is also untenable. The court dismissed the plaintiff's application for amendment first on 24 November 2006 by the registrar and then on 17 November 2008 by the judge on appeal to the judge in chambers against the order of dismissal by the registrar. It is true that the plaintiff had filed an appeal against the judge's order of dismissal on the application for amendment of the counterclaim. However, as the pleadings stand today what is before the court in relation to the application for striking out by the defendants in the counterclaim (including the fourth defendant) is the unamended counterclaim of the plaintiff.

[37] Finally, I also agree with the submission by the fourth defendant as well as other defendants who had applied to strike out the counterclaim that by virtue of s 72(b) of the Act, no order of court can be granted to affect any action taken by the first and second defendants or the fifth and sixth defendants in the counterclaim as special administrators under the Act. For that reason, the application to strike out by the fourth defendant is also allowed.

[38] Enclosures 54–55 are striking out application by the fifth and sixth defendants respectively of the plaintiff's counterclaim. The application is pursuant to O 18 r 19(1)(b), (c) and (d) of the Rules of the High Court 1980. The only allegation made against the fifth and sixth defendants as special administrators by the plaintiff in the counterclaim is that the special administrators had failed to take into consideration the interest of the third defendant in selling the assets and business of the third defendant to the fourth defendant. In this regard, it is to be noted that the first and second plaintiffs in the counterclaim were a minority shareholder of the third defendant and has no interest whether legal or equitable in the asset of the third defendant. The property belongs to the company and not to the shareholder: *Cheng Heng Ping & Ors v Perwira Affin Bank Bhd* [1998] MLJU 576; [1999] 1 CLJ 611. It is also to be noted that in carrying out the sale of the third defendant's business and assets to the fourth defendant, the special administrators were merely discharging their duties impose on them under the Act: *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, intervener)* [2004] 2 MLJ 257; [2004] 1 CLJ 701. And this was done by way of modified workout proposal dated 25 October 2002 which has been approved by an independent advisor. Furthermore, the relief sought by the plaintiff in the counterclaim cannot be granted because the claim involved reversal of the decision of the special administrators and independent advisor in respect of the sale. Secondly, it is a claim for damages. In this regard, s 48(3) of the Act provides that the decision of the independent advisor or the special administrator's proposal in respect of the sale is final and the court is precluded by s 72(b) of the same Act from granting any order which affect the decision of the independent advisor and special administrators in respect of the sale. As to the claim for damages, s 66(1) of the same Act protects the special administrators from being liable to be sued for lost or damages in respect of any act done by them in discharge of their duties: *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, intervener)* [2004] 2 MLJ 257; [2004] 1 CLJ 701. The plaintiff is also estopped from raising this issue as the same issue has been raised and dismissed by the court in the earlier suit: *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189; [1995] 3 CLJ 783.

[39] In opposing the application in encl 55 the first plaintiff in the counterclaim raised similar issues as the second plaintiff in opposing encl 54. For that matter the same arguments will be applicable to answer the various allegation raised by the first plaintiff in opposing the application by the fifth and sixth defendant in encl 55. However I would like to comment on one point that is the submission by the first plaintiff that encl 55 should be decided based on the proposed amended pleadings on the authority of *Suppuletchimi v Palmco Bina Sdn Bhd* [1994] 2 MLJ 368; [1994] 2 AMR 1191. On this point learned counsel of the fifth and sixth defendants had correctly stated that *Suppuletchimi v Palmco Bina Sdn Bhd* is distinguishable of the facts on not applicable to the instant facts of the case. In that case there was no amendment application

before the court. Therefore the court was not required to determine whether it is entitle to rely on the proposed amended pleadings. The remark by the learned judge in that case was clearly make on the assumption that the pleadings were amended. Therefore I agreed that what was said in *Suppuletchimi v Palmco Bina Sdn Bhd* is merely orbiter. In any case the parties are bound by their pleadings: *Menah Sulong v Lim Soo & Anor* [1983] CLJ (Rep) 263 (FC). In this instant, the counterclaim has not been amended; so the plaintiff in the counterclaim is bound by the unamended pleadings. For the above reason, encls 54–55 are also allowed.

[40] Enclosures 57 and 126 are the seventh defendant's application to strike out the first and second plaintiffs' counterclaim respectively on the grounds that the counterclaim discloses no reasonable cause of defence; it is scandalous and frivolous and vexatious or it is otherwise an abuse of process of the court. The main argument by the plaintiff in the counterclaim against the seventh defendant is that the seventh defendant has not declared his interest in the sale of the third defendant's business and assets to the fourth defendant when at the time of the sale the seventh defendant was the chairman of the fourth defendant and also non-executive chairman of Pengurusan Danaharta. It was thus argued for the plaintiff in the counterclaim that the transaction was tainted with bad faith. I do not think there is any merit in this contention of the plaintiff. It is undisputed fact that the sale of the third defendant's business and assets were done pursuant to a modified workout proposal prepared by the special administrators and approved by an independent advisor. It is also a fact that cannot be disputed that the appointment of the special administrators was approved by the oversight committee comprising of a representative of Ministry of Finance; a representative of the Central Bank and a representative of Securities Commission as provided by the s 22 of the Act. It is clear therefore that the affairs of the borrower were managed by the special administrators; and the subsequent sale and disposal of the borrower's business and asset ie of the third defendant were done at the instant of the special administrators. What is important to note is that the sale was done through open tender and the only bidder for the tender was the fourth defendant.

[41] It is true that the seventh defendant at the material time was the non-executive chairman and member of board of directors of the second defendant. It is also true the seventh defendant was then also the chairman of the fourth defendant.

[42] However having regard to the circumstances and the factual matrix of the case involving the sale of the third defendant's business and asset, I do not think that the seventh defendant was involved in the management of the assets and affairs of the third defendant. Therefore I agree with the submission by learned counsel of the seventh defendant that the plaintiff in the counterclaim

had failed to show any conflict of interest that required to be disclosed by the seventh defendant in respect of the sale of the third defendant's assets and business. In any event I repeat the earlier view that the injury if any in this instant is injury done to the third defendant. On the trite of company law that the company and shareholder is a separate legal entity, only the third defendant can mount this action if it wants to. But that is not the case here. For the above reason, I also allow the seventh defendant's application to strike out the plaintiff's counterclaim.

[43] All the applications are allowed with costs to the applicants.

Applications allowed with costs.

Reported by Kohila Nesan